

1989

# Thomas Humphries v. Gary Deland and M. Eldon Barnes : Brief of Appellant

Utah Court of Appeals

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UTAH COURT OF APPEALS  
BRIEF

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IN THE UTAH COURT OF APPEALS

DOCKET NO. 89-722-CA

THOMAS R. HUMPHRIES,	:	
Petitioner and Appellant,	:	Priority No. 3
	:	
vs.	:	
	:	
GARY DeLAND and M. ELDON BARNES,	:	Case No. 890722-CA
Respondents and Appellees.	:	

BRIEF OF RESPONDENTS

APPEAL FROM THE THIRD JUDICIAL DISTRICT COURT  
OF SALT LAKE COUNTY,  
THE HONORABLE FRANK G. NOEL PRESIDING

TO REVIEW ORDER GRANTING RESPONDENTS' MOTION TO DISMISS  
PETITION FOR WRIT OF HABEAS CORPUS

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FILED

APR 12 1990

Mary T. Noonan  
Clerk of the Court  
Utah Court of Appeals

IN THE UTAH COURT OF APPEALS

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THOMAS R. HUMPHRIES,	:	
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	:	Priority No. 3
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### JURISDICTION AND NATURE OF THE PROCEEDINGS BELOW

Mr. Humphries filed a petition for writ of habeas corpus in the Third Judicial District Court of Salt Lake County, which petition was dismissed by order of the district court on November 13, 1989. This appeal is from that order. The Court of Appeals has jurisdiction to decide this appeal pursuant to Section 78-2a-3(2)(g) of the Utah Judicial Code (Utah Code Ann. sec. 78-2a-3(2)(g) (Supp. 1989)).

### STATEMENT OF ISSUES

1. Whether the appellant had a protected liberty interest at stake in his parole eligibility hearing which would subject the hearing to the procedural protections of due process?

2. Whether the actions of the Board of Pardons during the appellant's parole eligibility hearing violated the Board's enabling statutes?

### DETERMINATIVE CONSTITUTIONAL PROVISIONS AND STATUTES

#### U.S. CONSTITUTION, AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

#### U.S. CONSTITUTION, AMENDMENT XIV

Section 1. All persons born or naturalized in the United

States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

CONSTITUTION OF UTAH, ARTICLE 1

Sec. 7. No person shall be deprived of life, liberty or property, without due process of law.

UTAH CODE ANN. 77-27-1

(5) "Expiration" occurs when the maximum sentence has run

UTAH CODE ANN. 77-27-7

(2) Before reaching a final decision to release any offender under this chapter, the board shall cause the offender to appear before it or any appointed hearing officer, and shall personally interview him to consider his fitness for release, and verify as far as possible information furnished from other sources. Any offender may waive a personal appearance before the Board of Pardons. Any offender outside of the state shall, if ordered by the Board of Pardons, submit to a courtesy hearing to be held by the appropriate authority in the jurisdiction in which the offender is housed in lieu of an appearance before the board. Rules to carry out this section shall be made by the board. The offender shall be promptly notified in writing of the board's decision.

UTAH CODE ANN. 77-27-9

(1) The Board of Pardons may pardon or parole any offender or commute or terminate the sentence of any offender committed to a penal or correctional facility which is under the jurisdiction of the Department of Corrections for a felony or class A misdemeanor except as otherwise provided in Subsection (2). The release of an offender shall be at the initiative of the board, which shall consider each case as the offender becomes eligible. However, a prisoner may submit his own application, subject to the rules of the board.

UTAH CODE ANN. 77-27-5

(3) The determinations and decisions of the Board of Pardons in cases involving approval or denial of any action, of paroles, pardons, commutations or terminations of sentence, orders of restitution, or remission of fines, forfeitures, and restitution, are not subject to judicial review. Nothing in this

section prevents the obtaining or enforcement of a civil judgment.

#### STATEMENT OF CASE

Mr. Humphries was convicted of issuing a bad check by the Second Judicial District Court of Davis County. After his parole eligibility hearing before the Utah Board of Pardons on March 24, 1989, Mr. Humphries filed a petition for writ of habeas corpus in the Third Judicial District Court, challenging the Board's actions in determining his parole date. Mr. Humphries claimed that the Board inappropriately considered his prior criminal record because the outcome of three of the twenty incidents reported in the record had not been verified. The outcomes were reported in the record as per Mr. Humphries' interpretation, and the record noted that these outcomes were not verified one way or the other.

Pursuant to the State's motion, the district court dismissed Mr. Humphries' petition by order dated November 13, 1989.

#### SUMMARY OF ARGUMENT

Mr. Humphries claims that the Board of Pardons' actions in considering evidence which had not been fully verified violated the due process provisions of the state and federal constitutions, as well as the enabling statutes the Board operates under. However, due process guarantees were inapplicable to Mr. Humphries' parole hearing since those guarantees only apply to government actions which may deprive a



person of "liberty" or "property." Both the federal and Utah state courts have determined that a defendant who has been duly convicted and sentenced to a term of incarceration has no protected liberty interest in being released prior to the expiration of his sentence, unless the state's parole statute limits the discretion of the parole board such that an inmate is legitimately entitled to parole upon meeting certain specified conditions. Because Utah's parole statute leaves the decision whether to parole inmates almost entirely up to the discretion of the Board of Pardons, the statute does not vest inmates with a protected liberty interest in parole, and parole hearings are not subject to the protections of due process.

Mr. Humphries' claim that the actions of the Board of Pardons in considering his allegedly inaccurate criminal record violated the Board's enabling statutes, is insubstantial because he fails to specify any provision violated by such action. In fact, the actions which appellant complains of were in full compliance with the standards and procedures established for the Board in section 77-27-7(2) of the Utah Code of Criminal Procedure.

In any case, Mr. Humphries suffered no harm from the Board's consideration of this record, since he was allowed to, and did, contest the accuracy of his criminal record before the Board.

Finally, Mr. Humphries' appeal must be dismissed because Board of Pardons' decisions regarding parole are not subject to judicial review.

## ARGUMENT

Mr. Humphries' Petition claims that the Board of Pardons deprived him of a constitutionally protected liberty interest without due process. "Liberty interests protected by the Fourteenth Amendment may arise from two sources--the Due Process Clause itself and the laws of the States." Hewitt v. Helms, 459 U.S. 460, 466 (1983). The Board of Pardon's decision could not have deprived the appellant of a constitutional right protected by due process, because an inmate's desire in being paroled is not a protected "liberty interest," under either the federal Due Process Clause, Utah's due process provision, or Utah's Parole Statute.

### I. NO LIBERTY INTEREST IN PAROLE EXISTS UNDER THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE U.S. CONSTITUTION.

In determining whether a protected interest arises under the Due Process Clause, "[t]he question is . . . whether the nature of the interest is one within the contemplation of the 'liberty or property language of the Fourteenth Amendment.'" Morrissey v. Brewer, 408 U.S. 471, 481 (1972) (Citation Omitted). In answering this question, it is important to remember that "[w]hile no State may 'deprive any person of life, liberty, or property, without due process of law,' it is well settled that only a limited range of interests fall within this provision." Hewitt, 459 U.S. at 466 (Citation omitted). In order to obtain a protected liberty interest "a person clearly must have more than an abstract need or desire for it. He must have more than a

unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it." Board of Regents v. Roth, 408 U.S. 564, 577 (1972).

The United States Supreme Court has determined that "there is no constitutional or inherent right of a convicted person to be conditionally released before the expiration of a valid sentence." Greenholtz v. Inmates of the Nebraska Penal and Correctional Complex, 442 U.S. 1, 7 (1979). The Court went on to explain why a parole grant applicant has no constitutional entitlement at stake in his parole hearing:

The natural desire of an individual to be released is indistinguishable from the initial resistance to being confined. But the conviction, with all its procedural safeguards, has extinguished that liberty right: "[G]iven a valid conviction, the criminal defendant has been constitutionally deprived of his liberty."

Greenholtz, 442 U.S. at 7, (quoting Meachum v. Fano, 427 U.S. 215, 224 (1976)).

The appellant does not deny receiving full due process protection during the proceedings in which he was convicted and sentenced. In those proceedings, the plaintiff was constitutionally deprived of his right to not be incarcerated until the expiration of his sentence. Under Utah's parole statute, "'[e]xpiration' occurs when the maximum sentence has run." Utah Code Annotated, sec. 77-27-1(5) (1953 as amended). The appellant had a hope of being paroled before the lawful expiration of his sentence. However, due process does not guarantee such a hope. "Process is not an end in itself. Its constitutional purpose is to protect a substantive interest to

which the individual has a legitimate claim of entitlement."

Olim v. Wakinekona, 461 U.S. 238, 250 (1983). The appellant had no legitimate claim of entitlement to parole because he had been constitutionally deprived of this right for the duration of his sentence. He only had a hope of parole, an expectation which is not within the contemplation of the "liberty" language of the Fourteenth Amendment.

II. NO LIBERTY INTEREST IN PAROLE EXISTS UNDER THE DUE PROCESS PROVISION OF THE UTAH CONSTITUTION, ARTICLE 1, SECTION 7.

While it is true that this Court could construe the Utah Constitution to include the mere anticipation or hope of being paroled within the contemplation of the "liberty" language of its due process provision, the Court has not previously done so. To the contrary, both the Utah Supreme Court and the Utah Court of Appeals have expressly followed the rule set forth by the United States Supreme Court in Greenholtz, supra. In Homer v. Morris, 684 P.2d 64 (Utah 1984), the Utah Supreme Court held that "[b]efore a parole date has been established, an inmate has no constitutional right to be placed on parole." Homer, 684 P.2d at 66. (Citing Greenholtz). Recently, the Court of Appeals cited Greenholtz for the rule that "'there is no constitutional or inherent right of a convicted person to be conditionally released before the expiration of a valid sentence.'" Greenholtz, 442 U.S. at 7, 99 S. Ct. at 2104." Hatch v. Deland, Case No. 890626-CA, p. 3, Ct. Ap. Memorandum Decision filed March 19, 1990 (For Publication). It is clear that under Utah law, as well as United

States law, the appellant has no right to parole that is subject to due process protections. For the purposes of due process, a protected interest in parole simply does not exist.

III. UTAH'S PAROLE STATUTE DOES NOT CREATE A LIBERTY INTEREST IN BEING GRANTED PAROLE.

Even though no inherent liberty interest in parole exists by virtue of either the Utah or United States Constitutions, such an interest may be created by state law. When a state's parole statute and regulatory provisions limit the discretion of the parole board, mandating release of inmates once certain specified conditions are met, courts may find a protected liberty interest in being paroled. When such a liberty interest is found, the Supreme Court has determined that some degree of due process applies, the measure of which depends on the nature and extent of the interest found. For example, in Greenholtz, supra, the Court held that Nebraska's parole statute created an expectation of release, which expectancy interest required that inmates have, first, the right to be heard at their parole grant proceedings, and second to be informed of the reasons if they are denied parole. However, the Court went on to hold that the Constitution required no more than these two procedural safeguards.

Greenholtz, 442 U.S. at 16.

When a state's parole statute lacks such mandatory language and leaves the parole decision in the discretion of the Board of Pardons, no protected liberty interest is created. Board of Pardons v. Allen, 482 U.S. 369, 379, nt. 10 (1987).

Appellant claims that Utah law does create a protected liberty interest in an inmate's expectation of parole, which would require Utah's Board of Pardons to heed certain procedural safeguards during parole grant proceedings. This assertion contradicts the holdings of both the Tenth Circuit and Utah state courts, which have determined that Utah's parole statute does not give rise to a protected liberty interest. Most recently, this rule was clearly set forth in Hatch v. Deland, Case No. 890626-CA, Ct. Ap. Memorandum Decision filed March 19, 1990 (For Publication).

[A]bsent statutory language limiting a parole board's discretion, "[t]here is no constitutional or inherent right of a convicted person to be conditionally released before the expiration of a valid sentence." Greenholtz, 442 U.S. at 7, 99 S. Ct. at 2104. . . .

Utah's parole statute contains no statutory limitations on the Board's discretion to grant or deny parole. Utah Code Ann. sec. 77-27-9(1) (Supp. 1989) provides, in relevant part: "The Board of Pardons may pardon or parole any offender or commute or terminate the sentence of any offender committed to a penal or correctional facility which is under the jurisdiction of the Department of Corrections for a felony or a class A misdemeanor . . . ." The statute precludes parole for certain offenses until the minimum term for the offense has been served. Under the controlling precedents, we hold that the Utah parole statute does not create an "expectation of parole" that would subject parole board proceedings to due process protections. See also, Dock v. Latimer, 729 F.2d 1287, 1290 (10th Cir. 1984), cert. denied, 469 U.S. 885 (1984) (concluding that the previous Utah parole statute did not create a liberty interest subject to due process protections).

Hatch v. Deland, Case No. 890626-CA, Ct. Ap. Memorandum Decision filed March 19, 1990, at 3 (For Publication). This holding is in accordance with the Utah Supreme Court's construction of Utah's

Parole Statute in State v. Schreuder, 712 P.2d 264, 277 (Utah 1985), holding that Utah's "sentencing system vests almost complete discretion in the Board of Pardons to determine the period of time that will actually be served." Since Utah's parole statute does not give inmates a protected liberty interest in parole, appellant's parole hearing was not subject to due process guarantees and his claim that he was denied due process is unfounded.

#### IV. NO DUE PROCESS VIOLATION OCCURRED IN ANY EVENT.

The appellant's claim in this case is that the Board of Pardons improperly relied upon prior erroneous convictions in setting his parole date. This argument is meritless. The appellant was allowed at the hearing to challenge whatever portions of his criminal record he felt were inaccurate. The appellant has been allowed to do this all along. Even in the preparation of the appellant's presentence investigation report (Appendix A), the petitioner was allowed to dispute his record and have that dispute noted. The investigator expressly stated in the report:

NOTE: The defendant had a copy of his NCIC records, and during the interview with this agent, he went through each case and shared his opinion of the disposition of these cases. Whenever there has been a question as to the disposition, this agent has placed in parenthesis the results of that particular case as per the defendant's interpretation. This agent has not been able to substantiate by a third party the information in parenthesis.

In effect the appellant disputed the entries in his criminal

record to the Board of Pardons. Because of this no prejudice to Mr. Humphries resulted.

V. THE ACTIONS OF THE BOARD OF PARDONS WERE IN COMPLETE COMPLIANCE WITH UTAH LAW.

Appellant claims that the actions of the Board of Pardons in considering his less-than-completely-verified criminal record violated the enabling statutes of the Board. The transparency of this claim is demonstrated by the fact that the appellant could not specify any particular statutory provision that was violated. He only makes the general allegation that the Board has violated Utah law, and cites Andrews v. Haun, 779 P.2d 229 (1989) for the proposition that the Board must abide by the statutes which created it. Respondents do not contest the Andrews proposition, but they fail to see in what manner the Board has violated Utah statutes. In fact, the actions of the Board were expressly in accordance with the Board's enabling statutes, which provide:

Before reaching a final decision to release any offender under this chapter, the board shall cause the offender to appear before it or any appointed hearing officer, and shall personally interview him to consider his fitness for release, and verify as far as possible information furnished from other sources. . . .

Utah Code Annotated, section 77-27-7(2) (1953, as amended)(Emphasis added). Utah's parole statute does not require that the evidence it considers meet admissibility standards applicable to the courts. The statute expressly requires that the board verify "as far as possible" the information it receives from sources other than the parole applicant. The Board did



this. The agent submitting the appellant's criminal record to the Board verified it as far as possible, and he carefully noted those entries which he was unable to substantiate. Since this is all that the statute requires, appellant's allegation that the Board somehow violated its enabling statutes by considering his partially unverified criminal record is simply not true. The Board's actions were in full compliance with Utah's parole statutes.

VI. MR. HUMPHRIES APPEAL MUST BE DISMISSED BECAUSE BOARD OF PARDONS' DECISIONS ARE NOT SUBJECT TO JUDICIAL REVIEW.

When a person has been sentenced to a term at the Utah State Prison, the Utah Board of Pardons is the entity which determines the exact length of time the person serves.

Utah Code Ann. 77-27-5(3) (1953 as amended) states:

The determinations and decisions of the Board of Pardons in cases involving approval or denial of any action, of paroles, pardons, commutations or terminations of sentence, orders of restitution, or remission of fines, forfeitures, and restitution, are not subject to judicial review. Nothing in this section prevents the obtaining or enforcement of a civil judgment.

See State v. Schreuder, 712 P.2d 264 (Utah 1985).

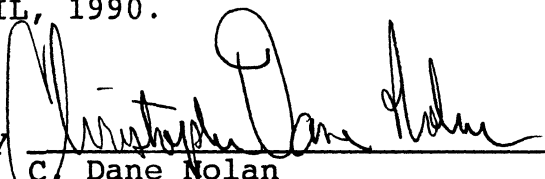
Mr. Humphries challenges the decision of the Board of Pardons in setting a particular a parole date. Mr. Humphries apparently believes he should have been given an earlier date. The challenge, obviously, is a request to the Court to review a parole decision made by the Utah Board of Pardons. Under U.C.A. §77-27-5(3) such a decision is not subject to judicial review.

Thus, Mr. Humphries' challenge must be dismissed.

CONCLUSION

Appellant's claim of a denial of due process must fail, since, absent a constitutional or statutorily created entitlement to parole, due process was inapplicable to his parole grant hearing. Likewise, appellant's claim that the Board violated Utah statutes is meritless. Not only did the Board comply with the standards and procedures established in U.C.A. section 77-27-7(2), the appellant has failed to specify any statutory provision that the Board's actions did violate. Having failed to show that the Board of Pardons violated any constitutional or statutory provision in determining his parole date, appellant's petition was appropriately dismissed by the district court. Finally, the appellant's challenge to the Board of Pardons decision regarding his parole is improper under U.C.A. §77-27-5(3). Respondents respectfully request this Court to affirm the District Court's order.

DATED THIS 12TH DAY OF APRIL, 1990.

By   
C. Dane Nolan  
Assistant Attorney General  
Attorney for Respondents

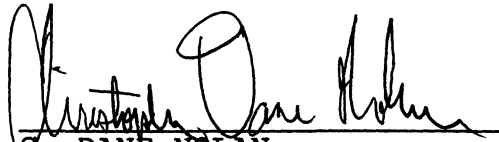
MAILING CERTIFICATE

I hereby certify that on the 12th day of April, 1990, I caused to be mailed a true and correct copy of the above and foregoing BRIEF OF RESPONDENTS to:

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## APPENDIX A

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PRESENTENCE REPORT  
THOMAS ROBERT HUMPHRIES

Law Enforcement - Continued

bad checks. Further investigation indicated the defendant may have passed as many as 20 additional checks. Detective Barton was convinced the defendant knew exactly what he was doing, and that this was not his first attempt at passing bad checks. Detective Barton was adamant in his feelings that the defendant should go to prison.

PRIOR RECORD:

A. JUVENILE: A check with the Utah Juvenile Court System revealed no prior record; however, discussion with the defendant and copies of TWX's and criminal records in possession of the defendant reveals the following arrests:

<u>DATE</u>	<u>PLACE</u>	<u>OFFENSE</u>	<u>DISPOSITION</u>
5-20-71	Redford, Michigan	Stolen Property	Convicted
6-28-71	Livonia, Michigan	Dangerous Drugs	30 days jail
11-26-71	Redford, Michigan	Dangerous Drugs	Not guilty (per defendant)
1-20-72	Clearwater, FL	Shoplifting	\$157 fine 30 days jail
4-2-72	Ft. Lauderdale, FL	DDC (Drunk & Disorderly Conduct)	\$27 fine
5-8-72	Detroit, Michigan	Att. Carrying Concealed Weapon	5 yrs. probation

B. ADULT: A check with the Utah Bureau of Criminal Identification, the Ogden City Police Department, Adult Probation and Parole, and TWX's sent to Michigan, California, and Florida revealed the following adult offenses:

<u>DATE</u>	<u>PLACE</u>	<u>OFFENSE</u>	<u>DISPOSITION</u>
7-13-72	Livonia, MI	Dangerous Drugs	Not guilty (per defendant)
7-1-74	Santa Cruz, CA	Drunk Driving Resisting Arrest	12 mos. probation \$345 fine
7-19-74	San Francisco, CA	Poss. of Heroin	Dismissed

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PRESENTENCE REPORT  
THOMAS ROBERT HUMPHRIES

Prior Record - Continued

<u>DATE</u>	<u>PLACE</u>	<u>OFFENSE</u>	<u>DISPOSITION</u>
6-17-76	Henderson, NV	DWI	Convicted
NOTE: The defendant indicates the case is under appeal.			
5-7-79	Oregon City, OR	Carrying a Concealed Weapon	Not guilty (per defendant)
11-9-81	Springfield, OR	DCS	Convicted
10-20-82	Oregon City, OR	DUI/DOS	Convicted
12-21-82	Oregon City, OR	Assault	Dismissed
1-11-83	Springfield, OR	DOS	Convicted
3-14-83	Oregon City, OR	Assault Criminal Mischief	Dismissed
4-8-85	Oregon City, OR	DUI/DOS False Info. to P.O.	Unknown
6-18-87	San Jose, CA	Stolen Property DUI	8 mos. jail Santa Clara Co., CA

NOTE: Mr. Humphries has two warrants for his arrest out of the Santa Clara County Sheriff's Office. They do not wish to extradite the defendant. He is a walk-away from the Probation Department Community Service Program. He served from June 18, 1987, until December 9, 1987, for a Possession of Stolen Property and a DUI conviction. This information was provided by Deputy Marta McGrath, Santa Clara County Sheriff's Department on November 21, 1988 at 1606 hours.

4-15-88	Ogden, Utah	Assault	30 days jail
9-14-88	Farmington, Utah	Bad Checks	Current offense

NOTE: The defendant had a copy of his NCIC records, and during the interview with this agent, he went through each case and shared his opinion of the disposition of these cases. Whenever there has been a question as to the disposition, this agent has placed in parenthesis the results of that particular case as per the defendant's interpretation. This agent has not been able to substantiate by a third party the information in parenthesis.